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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2023

STATE OF TENNESSEE v. JERRY ROMMELL GRAY

Appeal from the Criminal Court for Knox County
No. 91603 Steven W. Sword, Judge[1]

No. E2022-01000-CCA-R3-CD

After a jury trial, the Defendant, Jerry Rommell Gray, was convicted of felony murder, attempted especially aggravated robbery, and attempted aggravated robbery. The Defendant received a total effective sentence of life plus fifteen years. In this delayed appeal, the Defendant argues that the trial court erred by (1) ordering that additional fingerprints could be taken from the Defendant on the first day of trial; and (2) allowing an expert to testify regarding the conclusions of a non-testifying expert. Upon review, we respectfully affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Criminal Court Affirmed

TOM GREENHOLTZ, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and TIMOTHY L. EASTER, J., joined.

J. Liddell Kirk, Madisonville, Tennessee, for the appellant, Jerry Rommell Gray.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Charme P. Allen, District Attorney General; and Joanie Stewart, Assistant District Attorney General, for the appellee, State of Tennessee.

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[1] Judge Richard R. Baumgartner presided over the Defendant's trial. *See Jerry Rommell Gray v. State*, No. E2014-00849-CCA-R3-PC, 2014 WL 6876184, at *5 (Tenn. Crim. App. Dec. 5, 2014). Immediately after the jury returned its verdict, Judge Baumgartner imposed a life sentence for the first degree murder conviction. However, he was removed as a trial judge, and Judge Bobby McGee, who sat by interchange, sentenced the Defendant on the remaining convictions. *Id.* "Senior Judge Jon Kerry Blackwood, sitting by designation, denied [the Defendant's] March 8, 2011 Motion For New Trial." *Id.* Judge Sword presided over the Defendant's post-conviction proceedings and over his motion for a new trial hearing on remand.

OPINION

FACTUAL BACKGROUND

A. TRIAL AND FIRST APPEAL

1. Summary of Proof at Trial

This is the Defendant's fourth visit to this Court. On May 5, 2009, a Knox County grand jury charged the Defendant with the offenses of first-degree felony murder and the especially aggravated robbery of Ms. Lisa Wakefield. It also charged the Defendant with the attempted aggravated robbery of Donald Merritt.

We detailed the proof from the Defendant's trial in our opinion from his first appeal. *State v. Jerry Rommell Gray*, No. E2010-00637-CCA-R3-CD, 2012 WL 2870264 (Tenn. Crim. App. July 13, 2012) (*Gray I*). To briefly summarize that proof here by way of background, Mr. Merritt and Ms. Wakefield went to the Woodland Avenue Laundromat in Knoxville on April 30, 2009. While waiting for the clothes to dry, Mr. Merritt went outside to sit on a bench in front of their car, and Ms. Wakefield got into the car and turned on the heater. *Id.* at *1.

The Defendant and an accomplice, Mr. Brandon Brown, approached the couple. The Defendant approached Mr. Merritt on the bench, and Mr. Brown approached Ms. Wakefield in the car. The Defendant pointed his revolver at Mr. Merritt and demanded money. When Mr. Merritt responded that he did not have any money, the Defendant took Merritt's eyeglasses and said, "[W]e'll just go over here and see." *Id.*

The Defendant then went to the driver's side of the car where Ms. Wakefield was sitting. He broke the driver's side window and said something to Ms. Wakefield. Mr. Merritt saw her lean forward as if to turn off the motor when he heard a gunshot. Mr. Merritt then heard the two men say, "Let's go," and he saw them run toward Broadway. *Id.* Mr. Merritt saw Ms. Wakefield lying on the console with a bullet hole in her back. He flagged down a passing car and asked the driver to call 911.

As part of the investigation, law enforcement investigators collected fingerprint evidence from the car, and analysis revealed prints belonging to the Defendant and Mr. Brown. *Id.* at *2. Mr. Merritt said that he did not know the Defendant and that there was no reason for the Defendant's fingerprints to be on his car. *Id.* at *1. Based in part on this

evidence and a later statement from Mr. Brown, the Defendant was arrested and charged with the offenses identified above.

2. Fingerprinting Proof at Trial

a. Defendant's Motion in Limine

Before trial, the Defendant filed a motion in limine to exclude the fingerprint evidence, arguing that "the fingerprint card and its accompanying analysis is, by its very nature, an irrefutable example of testimonial hearsay." When the Defendant argued the motion, though, he explained that "the issue here is mainly with the fingerprint card, the initial step in analyzing latent prints as to compare them to existing prints." The Defendant also argued that he should be able to cross-examine the person who took his fingerprints for the Automated Fingerprint Identification System ("AFIS") to determine if the prints had been properly taken.

The trial court held a jury-out hearing on the motion. The State called to testify Mr. Timothy Scott Schade, a crime scene investigator and certified print examiner in the Knoxville Police Department's forensic unit. Mr. Schade testified that he found latent fingerprints on the victim's car at the crime scene. He entered one of those prints into AFIS, a fingerprint database maintained by the Tennessee Bureau of Investigation. Mr. Schade obtained several possible matches from the database, and upon further analysis, he was able to positively match the latent print to one set of prints contained in the database. This set of prints belonged to the Defendant.

After matching the latent print with the Defendant's prints, Mr. Schade asked Mr. Dan Crenshaw, who was Mr. Schade's "backup," to verify the print match. Mr. Crenshaw verified the match, and Mr. Schade then gave the information to "the investigator to follow up on." Mr. Schade said that "after that, we looked at – compared them to all the other prints that we got from the crime scene, and we matched another print that was on the driver's side door to him also."

Mr. Schade acknowledged that "if they don't get a good print to put into the AFIS system, then the odds of us matching it up are diminished greatly." He also noted that the quality of the prints, including any smudges, will affect an investigator's ability to obtain a match.

Upon questioning by the trial court, Mr. Schade explained that after a latent fingerprint was taken from the scene, he photographed the image with a digital camera,

scanned it into a computer, and marked "points" on it. He next submitted it for comparison to the AFIS database containing "all of the fingerprints for the State of Tennessee," and the database returned a list of potential matches. Mr. Schade then manually compared the possible matches to the latent print.

On recross-examination, Mr. Schade stated, "Every identification we made, we have it verified by at least one person." In the instant case, Mr. Crenshaw verified Mr. Schade's identification. Mr. Schade explained that Mr. Crenshaw was

> presented with something that I think is a match. Whether he thinks it's a match is-- his opinion. . . . And he also realizes that in a year, two years, three years, when it comes to the trial I might not be available, and he may have to testify to it. So that match becomes his match. So we both treat-- you know, take that very seriously, and it's not just a rubber stamp.

The trial court was satisfied that the chain of custody was established and that Mr. Schade was qualified as a fingerprint expert. The court also found that the fingerprints were reliable. Therefore, the court denied the Defendant's motion in limine and held that the fingerprints were admissible.

The State then sought permission to allow Mr. Schade to "roll the [D]efendant for prints" before the jury was called. Defense counsel started to object, but the trial court interjected, stating that "[j]ust like giving blood, that's not testimony." Defense counsel continued,

> [W]e would object at this stage of the game to doing so. It's as though the state's being allowed to gather more evidence to present to the jury, and I will have an hour and a half to look at and examine the finished product before it's presented to the jury. So I would rest on that argument, your Honor, and that the state has what . . . they have. I don't know why it's necessary to perfect their case to do this.

The trial court asked the State why it needed additional fingerprints. The State explained, "I'm afraid that the information about an AFIS hit is prejudicial to [the Defendant] and then that would be a basis for appeal. I want Tim Schade to point to him and then say that person's fingerprints match what was on the card." The trial court then allowed Mr. Schade to take the Defendant's fingerprints outside the jury's presence.

b. Trial Testimony

Later during the trial, Mr. Schade testified that he identified a latent fingerprint from the victim's car above the driver's side door handle. He also identified other latent prints on the driver's side door below the window and on the passenger's side door. He said that "the two best prints . . . happened to be on the driver's side door." He entered the prints into AFIS, and the database supplied a list of potential matches.

Mr. Schade explained the process that he used when comparing fingerprints found at the scene to potential matches from AFIS:

> What I do is I go through, and whenever I—whenever I make a match, I'll—we go through, it's called analysis comparison evaluation verification. So I go through the analysis of the print, see if it's good enough to be matched. Then I will compare it. Then I'll verify—or I'll evaluate whether it is a natural match or not. So whenever I consider it a match, I will send it to another person to have him look at it and see if he verifies that it is indeed a match.

Mr. Schade manually compared the possible matches and found a match to a print belonging to the Defendant. Mr. Schade's backup, Mr. Crenshaw, "agreed that it was a match." The Defendant did not object to this testimony.

On cross-examination, Mr. Schade said that the Defendant's known prints were in AFIS because of a previous arrest. When questioned as to whether Mr. Crenshaw's verification could have been influenced by knowing that a match had already been made, Mr. Schade testified that Mr. Crenshaw performed an independent analysis and did not "rubber stamp" his work.

3. Verdict and First Appeal

After the conclusion of the proof, the jury found the Defendant guilty of felony murder, attempted especially aggravated robbery, and attempted aggravated robbery. *Gray I*, 2012 WL 2870264, at *1. The trial court imposed a sentence of life for the felony murder conviction, ten years for the attempted especially aggravated robbery conviction, and five years for the attempted aggravated robbery conviction. The trial court aligned the sentences consecutively for a total effective sentence of life plus fifteen years.

On appeal, the Defendant argued "that the trial court violated *Crawford v. Washington*, 541 U.S. 36 (2004), by allowing the State to present fingerprint evidence; that the trial court erred when it allowed the State to take additional fingerprints of the [Defendant] during trial; and that the trial court erred by failing to instruct the jury regarding accomplice testimony." *Gray I*, 2012 WL 2870264, at *4. This Court concluded, however, that because the Defendant filed an untimely motion for a new trial, the Defendant had waived plenary review of all issues except for the legal sufficiency of the convicting evidence and sentencing. *Id.* at *5. We further concluded that none of the Defendant's remaining issues rose to the level of plain error, and we affirmed his convictions.

B. POST-CONVICTION PROCEEDINGS

The Defendant subsequently filed a petition for post-conviction relief "in which he sought a delayed appeal based on ineffective assistance of counsel, specifically alleging that trial counsel's failure to file a timely motion for [a] new trial was presumptively prejudicial." *Jerry Rommell Gray v. State*, No. E2014-00849-CCA-R3-PC, 2014 WL 6876184, at *1 (Tenn. Crim. App. Dec. 5, 2014) (*Gray II*). The post-conviction court determined that the Defendant was entitled to a delayed appeal but that he was not permitted to file a new motion for a new trial. *Id.* On appeal, this Court noted issues with the timeliness of the petition. Accordingly, we ordered a hearing to determine whether the petition was timely filed and, if so, whether the Defendant was entitled to file a second motion for a new trial. *Id.*

The Defendant sought and was granted permission to appeal to our supreme court. The supreme court found that the petition was timely, and it remanded the case to this Court to "consider whether the post-conviction court should have allowed [the Defendant] to file a new motion for a new trial when it granted him a delayed appeal." *Jerry Rommell Gray v. State*, No. E2014-00849-SC-R11-PC (Tenn. Apr. 13, 2015) (Order). On remand from the supreme court, we ordered that the Defendant be permitted to file a second motion for a new trial as part of a delayed appeal. *Jerry Rommell Gray v. State*, No. E2014-00849-CCA-R3-PC, 2015 WL 2257191, at *1 (Tenn. Crim. App. May 13, 2015).

C. DEFENDANT'S SECOND MOTION FOR A NEW TRIAL

In the Defendant's second motion for a new trial, he raised two issues that are relevant to this appeal. First, defense counsel argued that while Mr. Schade could testify to his own conclusions, the trial court should not have allowed him to testify to Mr. Crenshaw's opinions. Defense counsel also argued that the trial court committed reversible error by allowing the Defendant to be fingerprinted on the day of trial.

The trial court denied the second motion for a new trial. Regarding the fingerprint issues, the trial court stated:

> This is such a unique situation—I've never seen that happen, but I do believe that, had there not been any fingerprint evidence and the Court ordered that to be taken that morning, then compared, I do think that that would—would have been improper. Since the study's already been done, the defense had an opportunity to review the findings of Mr. Schade, the taking of the fingerprints again that morning, I don't think was an error. . . . I think, if it was an error, it's probably harmless, because we already had the findings of Mr. Schade.

The trial court entered its order denying the second motion for a new trial on June 27, 2022, and the Defendant filed a timely notice of appeal on July 25, 2022. On appeal, the Defendant contends that the trial court erred by (1) ordering that additional fingerprints could be taken from the Defendant on the day of trial for testing; and (2) allowing a testifying expert, Mr. Schade, to testify regarding the conclusions of a non-testifying expert, Mr. Crenshaw. For the reasons given below, we respectfully affirm the judgments of the trial court.

ANALYSIS

A. IN-COURT FINGERPRINTING

In his first issue, the Defendant questions "[w]hether the trial court erred in ordering that additional fingerprints be taken from the [Defendant] for testing[] on the day of trial." More specifically, the Defendant argues that "[t]he objectionable part of the trial court's order was that the order to obtain his fingerprints occurred on the morning of the trial." He asserts that his right to due process of law was "infringed by taking new evidence from him on the morning of a trial, without offering him any opportunity to prepare to defend against this evidence."

For its part, the State notes that the Defendant concedes that the State had probable cause to collect his fingerprints. It further argues that the Defendant has essentially raised an issue with respect to the timing of discovery but has not shown how he was surprised by the "new" evidence. The State also argues that, even if the Defendant were surprised, he is not entitled to relief because he failed to request a continuance or show how his pretrial preparations would have changed. We agree with the State.

We respectfully disagree that the State's taking of the Defendant's fingerprints on the morning of trial denied him due process of law. In *State v. Edward Sample*, No. W2014-01583-CCA-R3-CD, 2015 WL 6165159 (Tenn. Crim. App. Oct. 21, 2015), we addressed a similar issue. On the morning of Mr. Sample's trial, the prosecutor fingerprinted Mr. Sample, and these prints matched the fingerprints "in his records and identification file." *Id.* at *9. Among other arguments, Mr. Sample asserted that fingerprinting him in this manner violated his right to due process and fundamental fairness. *Id.* On appeal, we disagreed and held that

> [f]ingerprints are not testimonial or communicative in nature, and courts have long recognized that the Fifth Amendment protection against self-incrimination does not extend to the taking of fingerprints. *Schmerber v. California*, 384 U.S. 757, 764 (1966); *State v. Cole*, 155 S.W.3d 885, 899 (Tenn. 2005). Our supreme court has also concluded that fingerprinting a defendant in the presence of the jury does not violate his right to a fair trial. *Cole*, 155 S.W.3d at 899. Therefore, we conclude that the taking of the defendant's fingerprints did not infringe upon his right to due process.

Id. In the instant case, no party contests that the State had probable cause to seek an order compelling the fingerprinting or that the fingerprint comparison was a material part of the State's case on the issue of identification. In addition, and although not necessarily required, *cf. Cole*, 155 S.W.3d at 899 (Tenn. 2005); *United States ex rel. O'Halloran v. Rundle*, 384 F.2d 997 (3d Cir. 1967), the trial court ordered that the Defendant's fingerprinting take place outside of the jury's presence. Under these circumstances, we conclude that the Defendant's right to due process of law was not violated.

We also respectfully disagree that the timing of the fingerprinting denied the Defendant an opportunity to develop a trial strategy. Notably, the Defendant understood that fingerprint evidence would be a matter of contention at trial. He admitted that "[h]e knew there would be testimony about fingerprints on file with . . . AFIS, alleged to be his, matching fingerprints from the crime scene." He also filed a pretrial motion seeking an order declaring the fingerprint evidence inadmissible unless the person who lifted the latent prints from the victim's car testified at trial.

The Defendant's knowledge is important. This is not a case in which the Defendant was surprised with evidence to which he never had access. At any time, the Defendant could have compared his own fingerprints with the samples returned from the AFIS search or with the latent prints taken from the victim's automobile. In addition, after the State took the Defendant's fingerprints on the morning of trial, the Defendant did not seek a continuance to review the evidence further or to obtain an expert to conduct additional

investigation. Indeed, he does not assert now that an expert witness would have been able to refute the evidence. In other words, the Defendant has not shown how he suffered any prejudice at all by the timing of the fingerprinting. *See State v. Christopher Hatcher*, No. W2003-01867-CCA-R3-CD, 2004 WL 2058909, at *18 (Tenn. Crim. App. Sept. 15, 2004) (affirming trial court's decision to allow the State to introduce expert testimony that "the Defendant's fingerprints, taken the morning of trial, matched the fingerprints of the man who was pictured in the photo array" because defendant failed to show any prejudice). In the absence of any prejudice, therefore, we conclude that the Defendant was not denied any opportunity to review the fingerprinting issue or develop a trial strategy.

B. CONFRONTATION CLAUSE ISSUES

In his second issue, the Defendant questions "[w]hether the trial court erred in allowing a fingerprint expert to testify regarding the conclusions of another non-testifying expert." More specifically, the Defendant asserts that Mr. Schade's testimony about Mr. Crenshaw's verification of the Defendant's fingerprints was testimonial hearsay. He also argues that admission of this testimony violated the Sixth Amendment's Confrontation Clause and *Crawford v. Washington*, 541 U.S. 36, 54 (2004), because he had no prior opportunity to cross-examine Mr. Crenshaw.

Despite his objection in this Court, the Defendant did not object at trial to any reference about Mr. Crenshaw's verification of Mr. Schade's work. In fact, Mr. Schade testified specifically about the verification on at least three separate occasions, and the Defendant did not object to this testimony at any time. Instead, the Defendant cross-examined Mr. Schade about Mr. Crenshaw's years of experience, his certification as a latent fingerprint examiner, and his prior employment. He also questioned Mr. Schade about the processes involved in another person verifying a fingerprint.

We conclude that the Defendant has waived plenary review of this issue. Tennessee Rule of Evidence 103(a)(1) provides that "error may not be predicated upon a ruling which admits [evidence]," unless, in part, "a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context[.]" The Rules of Criminal Procedure contain a similar provision. *See* Tenn. R. Crim. P. 51(b). These basic principles apply to hearsay objections, and our law is clear that "[t]he failure to lodge a contemporaneous Confrontation Clause challenge results in a waiver of the issue." *State v. Charles Clevenger*, No. E2013-00770-CCA-R3-CD, 2014 WL 107984, at *5 (Tenn. Crim. App. Jan. 13, 2014) (citations omitted); *see State v. Deborah Morton*, No. E2019-01755-CCA-R3-CD, 2022 WL 2301439, at *20-21 (Tenn. Crim. App. June 27, 2022), *perm. app. denied* (Tenn. Nov. 16, 2022); *State v. Dejavone*

Lee Woods, No. M2020-00114-CCA-R3-CD, 2021 WL 3355498, at *8 (Tenn. Crim. App. Aug. 3, 2021), *perm. app. denied* (Tenn. Dec. 10, 2021).

It is true that the Defendant filed a pretrial motion in limine in which he broadly sought to compel the State to produce "every individual responsible from the inception and since the inception of having [the Defendant's] [p]rints on file." However, despite the broad language of the motion, when arguing the motion before the trial court, the Defendant's counsel explained that "the issue here is mainly with the fingerprint card, the initial step in analyzing latent prints as to compare them to existing prints." Counsel said that he was concerned about the source of the information in the AFIS database because he believed that the Defendant had not been previously arrested.

The Defendant's limitation of his motion is important. Filing a motion in limine can sufficiently preserve an issue for appeal when it "clearly presents an evidentiary question and where the trial judge has clearly and definitively ruled." *State v. McGhee*, 746 S.W.2d 460, 462 (Tenn. 1988); Tenn. R. Evid. 103(a)(2). However, when "'issues are only tentatively suggested or the record [is] only partially and incompletely developed in connection with a motion in limine,' the failure to lodge an objection during trial carries with it the risk that the issue has not been properly preserved." *State v. Adam Lee Ipock*, No. M2017-01374-CCA-R3-CD, 2018 WL 6077849, at *7 (Tenn. Crim. App. Nov. 20, 2018) (quoting *McGhee*, 746 S.W.2d at 462); *State v. Walls*, 537 S.W.3d 892, 900 (Tenn. 2017) ("[W]e reiterate that a mere 'tentative[ ] suggest[ion]' coupled with an 'incompletely developed' record poses great risk of waiver on appeal." (citing *McGhee*, 746 S.W.2d at 462)).

In this case, the Defendant's broad motion in limine "did not precisely delineate or sufficiently present" a Confrontation Clause issue with respect to the verifying expert's conclusions. *McGhee*, 746 S.W.2d at 463; *State v. Alder*, 71 S.W.3d 299, 302 (Tenn. Crim. App. 2001) ("The substance of Defendant's motion in limine against the testimony of Dr. Richart was particularly broad; therefore, the Defendant took a risk in not renewing his objection."). The Defendant's counsel did not mention or develop this issue during the argument on the motion. And, as is important for appellate review, the trial court did not address or resolve this issue at all. As such, because the trial court never made a "clear and definitive" ruling regarding Mr. Crenshaw's verification, the Defendant was required to object to Mr. Schade's testimony at trial to avoid waiving the issue on appeal. *See State v. David Duggan*, No. E2010-00128-CCA-R3-CD, 2011 WL 4910368, at *10 (Tenn. Crim. App. Oct. 17, 2011) (finding waiver of an issue when, "although the Defendant raised this issue in a motion in limine, the trial court had not clearly and definitively ruled on the motion in limine, and the Defendant did not make a contemporaneous objection to the cross-examination of the Defendant concerning his prior convictions."). As such, we conclude that the Defendant has waived plenary review of this issue.

Finally, we respectfully decline to analyze the issue further for plain error. First, the Defendant does not request that we conduct a plain error review, and we generally refrain from addressing issues not raised by the parties. *See State v. Alain Benitez*, No. M2021-00073-CCA-R3-CD, 2022 WL 1231075, at *20 (Tenn. Crim. App. Apr. 27, 2022), *perm. app. denied* (Tenn. Sept. 29, 2022) (declining to review Confrontation Clause challenge for plain error in the absence of appellant's request for plain error review); *State v. Devondre DeQuan Samuel*, No. E2020-01033-CCA-R3-CD, 2022 WL 3700890, at *10 (Tenn. Crim. App. Aug. 26, 2022) ("As pointed out by the State, Defendant is not entitled to plain error review of the trial court's limitation of his cross-examination of Mr. Berry because he has not requested such review."), *no perm. app.* Second, and more importantly, the State specifically raised the waiver argument in its response brief. However, despite being on notice about a possible waiver issue, the Defendant did not respond to this argument in a reply brief or otherwise. *See, e.g.*, *State v. Powell*, No. W2011-02685-CCA-R3-CD, 2013 WL 12185202, at *8 (Tenn. Crim. App. Apr. 26, 2013) (declining plain error review, in part, when "Defendant did not request in his brief on appeal that this issue be reviewed for plain error, nor has Defendant filed a reply brief in which he requests plain error review." (citation omitted)). Accordingly, we conclude that the Defendant is not entitled to plain error review.

CONCLUSION

In summary, we hold that the Defendant's right to due process of law was not violated when the trial court ordered that he be fingerprinted on the first day of trial. We also hold that, by failing to raise an objection at or before trial, the Defendant has waived any challenge to an expert testifying about the conclusions of a non-testifying expert. Accordingly, we respectfully affirm the judgments of the trial court.

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TOM GREENHOLTZ, JUDGE